Supreme Court, U.S.
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No. 91-795

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1991

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COLLINS MUSIC COMPANY, INC. and
COLLINS NOVELTY COMPANY, INC.,
*Petitioners,*

v.

SOUTH CAROLINA TAX COMMISSION,
*Respondent.*

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**Petition for Writ of Certiorari to the Supreme Court of South Carolina**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Respondent won an appeal in the South Carolina Supreme Court on the issue of whether S.C. Code Regs. 117-110 (1976) is a lawful regulation under the scope of its statutory authority.

Has the South Carolina Supreme Court denied petitioners due process of law as guaranteed by the fourteenth amendment of the United States Constitution, by:

> 1) rendering an unsupported decision based upon an issue not in controversy, and 2) upholding a regulation which on its face exceeds the statutory authority and constitutional underpinnings, and is therefore an irrational and arbitrary abuse of the South Carolina Tax Commission's power to assess and collect property tax on merchants' equipment?

## PARTIES

The parties to the proceeding in the South Carolina Supreme Court include Petitioners, the South Carolina Tax Board of Review, and the South Carolina Tax Commission. Pursuant to Sup. Ct. R. 29.1, Petitioner Collins Music Company, Inc. states that, during the years in issue, it was an affiliate of Petitioner Collins Novelty Company, Inc. Petitioners do not have parent companies, subsidiaries, or publicly held affiliates.

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**Petition for Writ of Certiorari to the Supreme Court of South Carolina**

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## PETITION FOR WRIT OF CERTIORARI

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Petitioners Collins Music Company, Inc. and Collins Novelty Company, Inc. ask that a writ of certiorari be issued to review the judgment of the Supreme Court of South Carolina, entered on May 6, 1991. A timely petition for rehearing was denied on August 15, 1991.

## OPINIONS BELOW

The opinion of the South Carolina Supreme Court, 407 S.E.2d 627 (S.C. 1991), appears as Appendix A to this Petition. The unpublished Order of the Court of Common Pleas for Richland County, entered on March 23, 1990, appears as Appendix B to this Petition. The unpublished Order of the Tax Board of Review, entered on August 3, 1989, appears as Appendix C to this Petition.

The unpublished Orders of the South Carolina Tax Commission, entered on June 2, 1988, appear as Appendices D and E to this Petition. The order denying Petitioners' request for rehearing, entered on August 15, 1991, appears as Appendix F to this Petition.

## JURISDICTION

The judgment of the South Carolina Supreme Court (Appendix A) was entered on May 6, 1991. A timely petition for rehearing was denied on August 15, 1991 (Appendix F). Jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(a) (West Supp. 1990).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1 provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

S.C. Const. art. I, § 8 (1868, amended 1971) provides as follows:

> In the government of this State, the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of another.

S.C. Const. art. X, § 1 (1868, amended 1977) provides in relevant part as follows:

> The General Assembly may provide for the ad valorem taxation by the State or any of its subdivi-

> sions of all real and personal property. The assessment of all property shall be equal and uniform . . . .

S.C. Const. art. X, § 2 (1976, amended 1977) provides in relevant parts as follows:

> (a) The General Assembly may define the classes of property and values for property tax purposes of the classes of property . . . . (c) statutes pertaining to the methods of assessment of property for ad valorem taxation not in conflict with this article shall continue in force until changed by the General Assembly.

S.C. Code Ann. § 12-3-130 (Law. Co-op. 1990) provides in relevant part as follows:

> The Commission shall make and publish all needed rules and regulations, not inconsistent with law, for the orderly and methodical performance of its duties and for conducting hearings, appeals and other proceedings before it, which rules and regulations shall have the full force and effect of law.

S.C. Code Ann. § 12-3-140(17) (Law. Co-op. 1990) provides in relevant part as follows:

> The Commission shall have and exercise all the powers conferred by law upon the former State Board of Equalization and upon the former State Board of Assessors prior to February 20, 1915 and:
>
> . . .
>
> (17) Has the sole responsibility for the assessment, appraisal, and equalization of taxable values upon the property used in the conduct of their business.
>
> . . .

S.C. Code Ann. § 12-37-930 (Law. Co-op. 1990) provides in relevant part as follows:

> All property shall be valued for taxation at its true value in money which in all cases shall be held to be the price which the property would bring following reasonable exposure to the market, where both the seller and the buyer are willing, are not acting under

> compulsion, and are reasonably well informed as to the uses and purposes for which it is adapted and for which it is capable of being used . . . Provided, further, fair market value of manufacturer's machinery and equipment used in the conduct of the manufacturing business, excluding, however, vehicles licensed by the Highway Department, boats and airplanes shall be determined by reducing the original cost by an annual allowance for depreciation as stated in the following schedule . . . . In no event should the original cost [of manufacturer's equipment] be reduced more than eighty percent.

S.C. Code Ann. § 12-37-970 (Law. Co-op. 1990) provides in relevant part as follows:

> The assessment for property taxation of merchants' inventories, equipment, furniture and fixtures . . . must be determined by the commission from property tax returns submitted by the taxpayers to the commission . . . . The commission by regulation shall prescribe the form of the return required by this section, the information to be contained in it, and the manner in which the returns must be submitted. . . .

S.C. Code Regs. 117-110 (1976) provides in relevant part as follows:

> Section 1.
>
> > The fair market value of merchant's furniture, fixtures, and equipment shall be the depreciated value as shown by the merchant's records for income tax purposes, provided however, that in no event is the original cost of the property to be reduced by more than 90% of the original capitalized cost.

## STATEMENT OF THE CASE

### The Parties

Petitioner Collins Music Company, Inc., a South Carolina corporation, operates numerous coin operated amusement devices such as jukeboxes, video game machines, pool tables and pinball machines (collectively referred to hereinafter as "Machines") in South Carolina. During the years at issue, Petitioner Collins Novelty Company, Inc., a South Carolina corporation, operated Machines in South Carolina. Petitioners will be referred to collectively as "Collins" where no distinction is required.

Respondent South Carolina Tax Commission ("Commission") is an administrative agency of the State of South Carolina. The Commission has the responsibility of assessing merchants' equipment for ad valorem tax purposes pursuant to S.C. Code Ann. § 12-37-970 (Law. Co-op. 1990) (hereinafter "§ 12-37-970"). There is no dispute the Machines operated by Petitioners in their respective businesses constitute "merchants' equipment" subject to property tax assessment.

For the tax years 1982, 1983, and 1984, Collins prepared the property tax returns as required by South Carolina law. The returns included all Machines utilized in the businesses, whether on location or held in storage; however, omitting 1) those Machines which, although included in the accounting records (as assets offset by accumulated depreciation), were permanently retired from service and placed in a warehouse, and 2) all Machines which were discarded.

### Order of the South Carolina Tax Commission

After an audit of Collins' records, the South Carolina Tax Commission ("Commission") ordered the inclusion of 1) the Machines permanently retired from service and 2) those Machines discarded, as merchants' equipment; there-

fore subjecting them to property tax. The Commission valued the retired and discarded Machines at ten (10%) percent of their original cost pursuant to S.C. Code Regs. 117-110 (1976) (hereinafter "Regulation 117-110"). Collins disagreed with the audit results and challenged the same in a hearing before the full Commission. Collins argued that: 1) Regulation 117-110 did not apply to the Machines which had been taken out of service permanently or which were discarded, because such Machines were not "merchants' equipment" [1]; and 2) if the Machines were "merchants' equipment" the minimum property tax value of ten (10%) percent of original cost imposed by Regulation 117-110 was beyond the authority of applicable statutory language and, therefore, the regulation was invalid.

The Commission issued its findings on June 2, 1988 concluding, among other things, that Regulation 117-110 was valid. The Commission stated that S.C. Code Ann. § 12-3-140(17) (Law. Co-op. 1990) (hereinafter "§ 12-3-140(17)") and § 12-37-970 require the Commission to value, respectively, the property of manufacturers and merchants for property tax purposes. Record at 28. S.C. Code Ann. § 12-37-930 (Law. Co-op. 1990) (hereinafter "§ 12-37-930") states that this value is to be at fair market value. The General Assembly amended § 12-37-930 to provide that the fair market value of *manufacturer's* machinery and equipment shall be determined by reducing the original cost by a stated depreciation rate, but not below twenty (20%) percent of the original capitalized cost. Record at 29 (emphasis added).

The Commission noted that, unfortunately, no similar provision was enacted to address merchants' property. Therefore, Regulation 117-110 fills this void and reasonably relates to § 12-37-930 by adopting the same proce-

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[1] The issue whether property no longer in service or discarded constitutes "merchants' equipment" is not before this Court on appeal.

dure for valuation of merchants' property as is used for manufacturers' property. Record at 29.

The Commission held that since § 12-37-930's use of such a valuation floor has been held to reflect fair market value,[2] it stands to reason that the regulation is also valid. Record at 29-30. Collins timely appealed the Commission's decision to the Tax Board of Review ("Board").

**Order of the Tax Board of Review**

On August 3, 1989 the Board issued its Order holding the equipment at issue was merchants' equipment and therefore subject to the provision of Regulation 117-110, but that Regulation 117-110 was invalid. Record at 85.

On the issue of the regulation's validity, the Board held that the heart of § 12-37-930 mandates that property is to be valued at its fair market value. Record at 83. The Board held that on its face, the regulation exceeds the scope of authority specifically provided by statute. Record at 84. The Board, citing *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984), stated that although a regulation has the force of law, it cannot exceed the authority set forth in the statute. Record at 84. Additionally, the general rules favoring validity of regulations are more restricted in the context of revenue laws because the courts have consistently held that such laws are construed in favor of the taxpayer. Record at 84-85, citing *Clark v. South Carolina Tax Comm'n*, 259 S.C. 161, 191 S.E.2d 23 (1972).

In concluding, the Board held that Tax Regulation 117-110 improperly extends the statutory mandate for property tax valuation with respect to the merchant's equipment at issue and is therefore invalid. The Board remanded the issue to the Commission for a determination

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[2] Citing *South Carloina Tax Comm'n v. South Carolina Tax Board of Review*, 278 S.C. 556, 299 S.E.2d 489 (1983).

of fair market value of the property and taxation on the basis thereof. Record at 85.

**Non-Jury Trial in the Court of Common Pleas**

On August 17, 1989, the Commission filed a Petition for Judicial review of the Board's decision with respect to the validity of Regulation 117-110. Collins filed an Answer and Crossclaim on September 15, 1989 alleging the Board's decision holding the property was merchants' equipment was incorrect and that portion of the Order invalidating Regulation 117-110 was not an error of law. On March 27, 1990, Judge Howell issued a final Order in which he sustained the Board's decision in its entirety.

Judge Howell agreed with the Board and relying on the same case authority cited by the Board, sustained the Board's decision that Regulation 117-110 is invalid because the regulation, on its face, exceeds the scope of the applicable statutory language, remanding the matter to the Commission for a determination of value. Record at 94 and 95. The court noted that it found no cases where the scope of this Regulation has been challenged by a taxpayer. Record at 94.

**Decision of the South Carolina Supreme Court**

Appeal to the South Carolina Supreme Court was taken on March 30, 1990 by the Commission regarding that part of the Order affirming the invalidity of the regulation.[3] The court's opinion, entered May 6, 1991, framed the issue in controversy as whether Regulation 117-110 is constitutional. *South Carolina Tax Comm'n v. South Carolina Tax Bd. of Review*, 407 S.E.2d 627 (S.C. 1991). This was the first point in time the issue of the regulation's "constitutionality" was called into question.

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[3] On appeal, Collins abandoned its argument whether the valueless equipment constituted "merchants' equipment."

The supreme court states that although § 12-37-930 does declare that "[a]ll property shall be valued for taxation at its true value in money . . . .", it also provides for an allowance for depreciation of manufacturer's machinery or equipment, which depreciation may not exceed eighty percent. *Id.* at 629. The supreme court then states that "[i]t would be anomalous to hold that 12-37-930's "true value" requirement be used to invalidate Regulation 117-110 when that very statute allows the same type of floor on depreciation for valuing manufacturer's equipment and inventory."[4] *Id.*

The supreme court then concludes:

> [t]he Tax Commission is authorized by the General Assembly to define the value of property, in this instance merchants' equipment, and to assess a tax on that property. Consequently, we conclude that the Tax Commission has not exceeded its authority by promulgating Regulation 117-110, as it is within statutory and constitutional bounds. Having found that the Tax Commission may validly adopt a methodology which values equipment or inventory by utilizing a depreciation floor, we hold that the circuit court and Board erred as a matter of law in holding Regulation 117-110 invalid and remand to the Tax Commission for valuation of the property in accordance with this ruling.

*Id.*

## REASONS FOR GRANTING THE WRIT

This Petition raises an important federal question regarding Collins' fundamental right to due process, both procedural and substantive, as guaranteed by the fourteenth amendment to the United States Constitution.

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[4] The court states that the constitutionality of § 12-37-930's twenty percent floor on depreciation for valuing manufacturer's equipment and inventory was expressly upheld in *South Carolina Tax Comm'n v. South Carolina Tax Bd. of Review*, *supra* note 2.

This is the only case ever to challenge Regulation 117-110 and without this Court's intervention, the supreme court will have succeeded in unjustly declaring the regulation constitutional in outright contradiction with the statute authorizing the Commission to promulgate the regulation. This Court's grant of writ of certiorari is particularly warranted in this case as the Court is Collins' forum of last resort.

As this Court's decisions have emphasized, "the Due Process Clause grants the aggrieved party the opportunity to present his case and have its *merits fairly judged*. *Logan v. Zimmerman Brush Co.*, 455 U.S. 421, 433 (1982) (emphasis added). This Court may overrule a piece of legislation where the substance of certain types of lawmaking go beyond any proper sphere of governmental activity and produce arbitrary and unreasonable results. *Standard Computing Scale Co. v. Farrell*, 249 U.S. 571, 577 (1919). "For the protection of the federal Constitution applies, whatever the form in which the legislative power of the state is exerted; that is, whether it be by a Constitution, an act of the Legislature, or an act of any subordinate instrumentality of the state exercising delegated legislative authority . . . ." *Id.* Neither the South Carolina Constitution nor statutory provisions have ever granted the Commission the authority to enact the type of regulation now permitted by the supreme court.

This Court traditionally has held that "the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S. at 429. Procedural due process may involve the review of the general fairness of a procedure authorized by legislation or merely the review of the fairness of a decision in an individual case.[5]

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[5] *See Logan*, 455 U.S. 421 (1982), in which this Court found a procedural due process violation where the Illinois Supreme Court

Whereas Collins was once defending itself in the lower court seeking to protect valueless property from an invalid tax regulation, Collins now comes forward as Petitioner asking this Court to rectify the supreme court's unsupported decision.

The applicable statute, § 12-37-930, clearly gives taxpayers the right to have merchants' equipment valued at its "true value" for tax purposes "which in all cases shall be held to be the price which the property would bring following reasonable exposure to the market, where both the seller and the buyer are informed as to the uses and purposes for which it is adapted and for which it is capable of being used." The Commission promulgated Regulation 117-110, which does not provide for fair market valuation as required under the state statute; instead, the regulation requires something greater than fair market value to be used even where merchants' equipment has no economic value. The supreme court's decision to uphold a regulation which is inconsistent and on its face goes beyond the scope of the underlying statute evidences the lack of fair process to remedy the injury to the taxpayers.

To put it briefly, petitioners have a specific statutory right stemming from the state constitution, a regulation was enacted directly impairing this right, and the highest court of the state has not repaired the injury to its taxpayers. The supreme court's opinion is in itself a violation of due process for the following reasons:

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denied petitioner the right to have his claim considered by the Illinois Fair Employment Practices Commission due to the Commission's failure to set a hearing within the proscribed time period. *See also* John E. Nowak and Ronald D. Rotunda, *Constitutional Law*, 4th Edition, p. 338.

## I. THE COURT MISCONSTRUES COLLINS' DISPUTE WITH THE COMMISSION

The court's recitation of the facts misconstrues Collins' dispute with the Commission. The supreme court specifically states: "The issue is whether Regulation 117-110 is constitutional." This was not then, and still is not, the issue of the case. While the constitutionality of the regulation was a supporting element of Collins' argument relating to the statutory principles of "fair market value," the issue in controversy was that Regulation 117-110 exceeds the limits of the statutory foundation provided in § 12-37-930. In keeping with the maxim that a court should not reach an issue of constitutionality where a decision may be made based upon a valid statute, both the Board and the lower court based their decisions to invalidate the regulation upon § 12-37-930.

The Board's Order calls the issue in dispute the "Validity of Regulation." Record at 83. The Board states that "[t]he regulation on its face exceeds the scope of authority specifically provided by the statute." Record at 84. Even though the Board specifically held that "Tax Regulation 117-110 improperly extends the *statutory* mandate for property tax valuation with respect to the merchants' equipment at issue and is therefore invalid," [6] the supreme court states that the Board held "Regulation 117-110 could not be enforced because it was *unconstitutional*." *South Carolina Tax Comm'n v. South Carolina Tax Bd. of Review*, 407 S.E.2d at 628. (emphasis added). The Board did not hold the regulation unconstitutional; rather, the Board held that the regulation exceeds the statutory mandate for property tax valuation and is therefore invalid.

The Court of Common Pleas frames the issue as the "Validity of Regulation." Record at 91. The trial court states "[a]lthough a regulation has the force of law, it

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[6] Record at 85 (emphasis added).

cannot exceed the authority set forth in the statute." Record at 94. The thrust of the trial judge's opinion by affirming the Board was that the regulation exceeds the bounds placed on it by the statutory language of § 12-37-930. The constitutional references in his opinion were to demonstrate the constitutional underpinnings for the "true value in money" valuation standard of the statute. Record at 86-95.

## II. THE COURT CITES TO INAPPLICABLE CASE LAW

After misconstruing the question presented in the case, the supreme court then states "it would be anomalous to hold the regulation invalid when a similar provision in § 12-37-930 has been upheld as constitutional." *South Carolina Tax Comm'n v. South Carolina Tax Bd. of Review*, 407 S.E.2d at 629. The supreme court states the constitutionality of § 12-37-930's twenty percent floor on depreciation for valuing manufacturer's equipment and inventory was expressly upheld in the case of *South Carolina Tax Comm'n v. South Carolina Tax Bd. of Review*, 278 S.C. 556, 299 S.E.2d 489 (1983) (hereinafter "*SCTC*"). However, the holding of the case did *not* revolve around the constitutionality of the twenty percent floor; rather, the court held that the Board did not have the *jurisdiction* to make its own determination of the value of manufacturer's property and was therefore obligated to apply the statutory formula. *SCTC*, 299 S.E.2d at 491-492. The supreme court in dicta stated that the *Legislature* has the authority to determine the method or manner in which different forms of property may be taxed. *Id.*, at 492 (emphasis added).

The only issue in controversy in the *SCTC* case was whether the Board could ignore the legislatively determined fair market value formula under § 12-37-930 for assessing the value of manufacturing equipment. The Commission took the position that the method provided in

the statute is controlling on the Board and that the Board exceeded its authority by departing therefrom. *Id.*, at 491. The supreme court stated that neither the Commission nor the Board has the jurisdiction to make such a determination with respect to the statute involved. *Id.*

The supreme court's reliance on *SCTC* is misplaced. The statute in the cited case involves a *legislative* determination for valuing manufacturer's equipment; the regulation to which Collins is being subjected is an *administrative* determination for valuing merchants' equipment that clearly violates the valuation standards of § 12-37-930. In fact, had the supreme court consistently applied the *SCTC* holding to Collins' case, it would have ruled that the Commission does not have the jurisdiction to make its own determination of the value of merchants' property and is obligated to apply the statutory formula. That statutory formula is the fair market value as specified in § 12-37-930.

## III. VIOLATION OF SEPARATION OF POWERS

S.C. Const. art. I, § 8 (1868, amended 1971) (hereinafter "Article I, § 8") provides for the separation of powers between the branches of government:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of another.

The supreme court states that the Commission has the authority to make and publish rules and regulations, not inconsistent with the law, for the orderly and methodical assessment on merchants' equipment. S.C. Code Ann. § 12-3-130 (Law. Co-op. 1990) and § 12-37-970. The supreme court then specifically holds:

> [h]aving found that the Tax *Commission may validly adopt a methodology which values equipment or inventory by utilizing a depreciation floor*, we hold that the circuit court and Board erred as a matter of law in holding Regulation 117-110 invalid and remand to the Tax Commission for valuation of the property in accordance with this ruling.

*South Carolina Tax Comm'n v. South Carolina Tax Bd. of Review*, 407 S.E.2d at 629 (emphasis added). The supreme court's opinion provides the Commission with the equivalent of legislative authority never intended by either the South Carolina Constitution or S.C. Code Ann. § 12-3-130 (Law. Co-op. 1990). The court's granting such authority to the Commission directly contradicts S.C. Const. art. X, § 1 (1930, amended 1977) (hereinafter "Article X, § 1"), as well as S.C. Const. art. X, § 2 (1976, amended 1977) (hereinafter "Article X, § 1").

A statute which in effect provides an absolute and undefined discretion in an administrative body, bestows arbitrary powers and is an unlawful delegation of legislative powers. *South Carolina Highway Dept. v. Harbin*, 226 S.C. 585, 86 S.E.2d 466 (1955). If the separation of powers clause prevents the Legislature from enacting this type of legislation, then it follows that the supreme court is also barred from achieving precisely the same result through judicial construction of a statute.[7]

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[7] This Court reached the same result regarding a criminal statute in *Bouie v. City of Columbia*, 378 U.S. 346, 362 (1964). Although the *Ex Post Facto Clause* in *Bouie* prevented the judiciary from, in essence, creating criminal law, separation of powers requires the same result in this context.

## IV. THE COURT'S DECISION CONTRADICTS THE CONCEPTS OF ADMINISTRATIVE LAW

This Court has held that an administrative agent cannot introduce a regulation legislative in character because to do so would exceed his powers; for the powers conferred upon an administrative agent are not legislative in nature. *Standard Computing Scale Co. v. Farrell*, 249 U.S. at 575. The supreme court's holding in Collins' case contradicts the language the court quoted in *SCTC*:

> An administrative agency has only such powers as have been conferred upon it by law and must act within the granted authority for an authorized purpose. It may not validly act in excess of its powers, *nor has it any discretion as to the recognition of or obedience to a statute.*

299 S.E.2d at 491, citing 2 Am.Jur.2d, Adm. Law, § 188, p. 21 (emphasis added).

In *SCTC*, the supreme court holds that the Board has exceeded its authority by disregarding the statutory method for assessing the value of manufacturers' equipment, and then in Collins' case allows the Commission to validly adopt *any* methodology which values merchants' equipment by utilizing a depreciation floor. By providing the Commission with this authority, the supreme court has given the equivalent of legislative authority to the Commission to exceed the statutory boundaries of their authority to enact regulations in connection with merchants' equipment. The supreme court's grant of authority is in contradiction to Article I, § 8 of the South Carolina Constitution.

In reality, the supreme court now provides the Commission with the authority to supersede the words of the statute by allowing to use unfettered discretion while interpreting the words of a statute. With the supreme court's holding carried to its logical end, the Commission may validly adopt a depreciation floor of any amount it so desires.

## V. THE COURT IGNORES ITS OWN PRECEDENT

The supreme court has also completely ignored its own holding that a regulation cannot exceed the authority set forth in its supporting statute. *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 325 S.E.2d 313 (1984). It also disregarded its holdings that the general rules favoring validity of regulations are more restricted in the context of revenue laws because such laws are construed in favor of the taxpayer. *See Clark v. South Carolina Tax Comm'n*, 259 S.C. 161, 191 S.E.2d 23 (1972); *Deering Milliken, Inc. v. South Carolina Tax Comm'n*, 257 S.C. 185, 184 S.E.2d 711 (1971); *Ryder Truck Lines, Inc. v. South Carolina Tax Comm'n*, 248 S.C. 148, 149 S.E.2d 435 (1966).

## VI. INCONSISTENT STATUTORY INTERPRETATION

The supreme court's opinion clearly demonstrates inconsistent statutory interpretation so as to permit the Commission to have its cake and eat it too, no matter what the cost to the rights of the citizens of the state. Section 12-37-930 provides qualifying language which causes inclusion of the "fair market value of machinery and equipment *used in the conduct of the manufacturing business*. . . ." (Emphasis added). On the one hand, when Collins made the argument that a similar provision should apply to merchants' equipment no longer used in the merchant's business, each and every level of the review process held that § 12-37-970's lack of similar language meant that the legislature did not intend for the same provision to apply to merchants' equipment. On the other hand, Collins is now told by the supreme court that although § 12-37-930 does not provide the same type of valuation for merchants' equipment using a depreciation floor concept in determining "fair market value," the depreciation floor applicable to manufacturers' equipment in § 12-37-930 was really meant to apply to merchants' equipment as well. How can the court interpret

the silence in one statute to mean that the legislature specifically intended no similar provision to apply and then in another say that the legislature's silence meant for missing statutory language to apply? If the General Assembly desired the property of merchants and manufacturers be valued in a similar manner, they could have amended the clear language of the statute. The fact that they did not is determinative of their intent and this issue.

## CONCLUSION

This Court has the authority to review a federal question where there is an unfair and unsupported state-court decision on a question of state procedure. *Bouie v. City of Columbia*, 378 U.S. at 355. Without this Court's review, this case will stand for the supreme court's outright ability to ignore the rule of law to the detriment of Collins as both taxpayers and litigants. There was neither a fair decision-making process nor a valid regulation, a violation of Collins' due process rights under the fourteenth amendment to the United States Constitution procedurally with respect to the supreme court's arbitrary and capricious decision and substantively with respect to the regulation itself.

This Court cannot be denied jurisdiction where a state court bases its decision without relying on the unconstitutional regulation so as to avoid this Court's jurisdiction. *Terre Haute & Indianapolis R.R. Co. v. State of Indiana ex rel. Ketcham*, 194 U.S. 579 (1904). "We cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes in its judgments." *Id.*, at 583. As demonstrated throughout this petition, this is precisely what the supreme court has done.

One can only speculate as to the motive behind the supreme court's decision. Perhaps the decision is motivated by fiscal crises facing South Carolina. Very re-

cently this Court reversed the South Carolina Supreme Court in a tax case where the court attempted to impose a tax on veterans benefits after this Court decided no tax could be imposed. *Bass v. South Carolina*, 395 S.E.2d 171 (S.C. 1990), *vacated* 111 S.Ct. 2881 (1991). It is not the place of the supreme court to prevent the state from losing tax dollars at the cost of denying taxpayers due process.

Collins is entitled to the constitutional guaranty that no person shall be deprived of life, liberty, or property for arbitrary reasons, where the conduct from which the deprivation flows is proscribed by legislation the enactment of which is not within the scope of the Commission's authority.* Because there are important constitutional questions involving the impairment of Collins' fundamental rights, this Court should review the decision below. For these reasons, Petitioners respectfully ask that a writ of certiorari issue to the Supreme Court of South Carolina.

Respectfully submitted,

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November 8, 1991
Greenville, South Carolina

* 16A Am.Jur.2d, Const. Law, § 816, p. 978.

# APPENDICES

## APPENDIX A

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Opinion No. 23387

SOUTH CAROLINA TAX COMMISSION,
*Appellant-Respondent,*

v.

SOUTH CAROLINA TAX BOARD OF REVIEW, COLLINS MUSIC CO., INC., and COLLINS NOVELTY CO., INC., of whom COLLINS MUSIC CO., INC. and COLLINS NOVELTY CO., INC. are,

*Respondents-Appellants.*

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Appeal from Richland County
William T. Howell, Judge

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Heard February 19, 1991—Filed May 6, 1991

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REVERSED IN PART; AFFIRMED IN PART
AND REMANDED

Chief Deputy Attorney General Joe L. Allen, Jr. and Deputy Attorney General Ray N. Stevens, both of Columbia, for Appellant-Respondent.

Curtis W. Stodghill and Robert A. Dobson, III, both of Dobson and Dobson; and John W. Kittredge, of Wilkins, Nelson & Kittredge, all of Greenville, for Respondents-Appellants.

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TOAL, A.J.: This appeal arises out of a dispute between appellant South Carolina Tax Commission (Tax

Commission) and respondents Collins Music Co., Inc. and Collins Novelty Co., Inc. (Collins) over the valuation of certain property as merchant's equipment pursuant to S.C. Code Ann. § 12-37-970.[1] If property is merchant's equipment, it is subject to Tax Commission Regulation 117-110,[2] which attributes a value to the property of not less than ten percent of its original cost for purposes of taxation. The issue is whether Regulation 117-110 is constitutional. The trial judge held that Regulation 117-110 was unconstitutional; we reverse.

## FACTS

Upon auditing the tax records of Collins for the years 1982-1984, the Tax Commission discovered that a number of coin operated machines belonging to Collins had not been declared as merchant's equipment even though they appeared as fully depreciated assets on Collins' tax returns. Collins disputed the Tax Commission's characterization of the property, claiming that, since the machines were in storage or discarded, they were not merchant's equipment. Collins also attacked the validity of Regulation 117-110, claiming that it unconstitutionally set the value of merchant's equipment at an amount different from fair market value in contravention of statutory and constitutional authorities.

After a hearing, the Tax Commission ruled that Regulation 117-110 was valid and that the machines were merchant's equipment and, thus, subject to Regulation 117-110. Regulation 117-110 provides in pertinent part:

> Section I. The fair market value of merchants' furniture, fixtures and equipment shall be the depreciated value as shown by the merchants' records for

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[1] Section 12-37-970 requires the Tax Commission to assess the value of "merchants' inventories, equipment, furniture and fixtures . . ." for property taxation.

[2] 27 S.C. Code Ann. Regs. 117-110 (1976).

> income tax purposes, provided however, that in no event is the original cost of the property to be reduced by more than ninety percent of the original capitalized cost.

Collins appealed to the Tax Board of Review (Board), which held that, even though the machines were merchant's equipment, Regulation 117-110 could not be enforced because it was unconstitutional. The Tax Commission then appealed the Board's invalidation of Regulation 117-110 to the circuit court pursuant to the Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310—400 (1986). Collins answered and cross-claimed, alleging that the Board had erred in holding that the property was merchant's equipment and in excluding additional evidentiary materials Collins had sought to include in the record just before the Board's hearing.

The circuit judge affirmed the Board's findings. Tax Commission appealed.

## LAW/ANALYSIS

Tax Commission argues that the circuit court and Board erred as a matter of law in ruling that Regulation 117-110 is unconstitutional. Collins relies on the orders of the Board and circuit court, which held that Regulation 117-110 was invalid on its face because it valued property in a way not permitted by S.C. Code Ann. § 12-37-930[3] (1990 Supp.) and Article III, § 29,[4] Article

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[3] Section 12-37-930 states:

> All property shall be valued for taxation at its true value in money which in all cases shall be held to be the price which the property would bring following reasonable exposure to the market, where both the seller and the buyer are willing, are not acting under compulsion, and are reasonably well informed as to the uses and purposes for which it is adapted and for which it is capable of being used . . . . In no event should the original cost be reduced more than eighty percent.

[4] Article III, § 29 provides: "All taxes upon property, real and personal, shall be laid upon the actual value of the property taxed,

X, § 1,[5] and Article X, § 3A[6] of the South Carolina Constitution.

While § 12-37-930 and Article III, § 29, have remained unchanged, Article X, § 1, was amended in 1977. It provides, in pertinent part: "The General Assembly *may* provide for the ad valorem taxation by the state or any of its subdivisions of *all* real and personal property." (emphasis added).

In addition, Article X, § 2, was amended to state:

> "(a) The General Assembly *may define* the classes of property and *values* for property tax purposes of the classes of property . . . . (c) statutes pertaining to the methods of assessment of property for ad valorem taxation not in conflict with this article shall continue in force until changed by the General Assembly." (emphasis added).

Article X, § 3A, was repealed by the 1977 amendments.

According to the 1977 constitutional amendments, the legislature is empowered to define value. "Value," therefore, is not constitutionally limited to "fair market value."

While § 12-37-930 does declare that "[a]ll property shall be valued for taxation at its true value in money . . . .", it also provides an allowance for depreciation of machinery or equipment, which depreciation may not exceed eighty percent. It would be anomalous to hold

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as the same shall be ascertained by an assessment made for the purpose of laying such tax."

[5] Former Article X, § 1, provided in pertinent part: "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property, real, personal and possessory. . . ."

[6] Former Article X, § 3A stated: "All property subject to taxation shall be taxed in proportion to its value."

that § 12-37-930's "true value" requirement be used to invalidate Regulation 117-110 when that very statute allows the same type of floor on depreciation for valuing manufacturer's equipment and inventory. Moreover, the constitutionality of that statute's twenty percent floor on depreciation for valuing manufacturer's equipment and inventory was expressly upheld in the case of *South Carolina Tax Commission v. S. C. Tax Board of Review*, 278 S.C. 556, 299 S.E.2d 489 (1983).

The General Assembly has empowered the Tax Commission to "make and publish all needed rules and regulations not inconsistent with the law for the orderly and methodical performance of its duties. . . ." S.C. Code Ann. § 12-3-130 (1977). The Tax Commission has a duty to assess taxes on merchant's equipment pursuant to S.C. Code Ann. § 12-37-970 (1990 Supp.).

The Tax Commission is authorized by the General Assembly to define the value of property, in this instance merchant's equipment, and to assess a tax on that property. Consequently, we conclude that the Tax Commission has not exceeded its authority by promulgating Regulation 117-110, as it is within statutory and constitutional bounds. Having found that the Tax Commission may validly adopt a methodology which values equipment or inventory by utilizing a depreciation floor, we hold that the circuit court and Board erred as a matter of law in holding Regulation 117-110 invalid and remand to the Tax Commission for valuation of the property in accordance with this ruling.

Because of our reversal of the Board on the above issue, we need not decide whether the Board has authority to invalidate a regulation. On all other issues the circuit court is affirmed pursuant to Supreme Court Rule 23. Accordingly, this matter is REVERSED IN PART, AFFIRMED IN PART AND REMANDED.

GREGORY, C.J., CHANDLER and FINNEY, J.J., and Acting Associate Justice Alexander M. Sanders, Jr., concur.

## APPENDIX B

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

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Case No. 89-CP-40-3902
Case No. 89-CP-40-3903

SOUTH CAROLINA TAX COMMISSION,
*Petitioner,*

vs.

SOUTH CAROLINA TAX BOARD OF REVIEW,
COLLINS MUSIC CO., INC. and COLLINS NOVELTY CO., INC.,
*Respondents.*

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### ORDER OF JUDGE HOWELL

[Entered March 27, 1990]

This was an action brought by the South Carolina Tax Commission (Commission) as petitioner, under South Carolina Code Section 1-23-380, seeking a reversal of an order rendered by the Tax Board of Review (Board). The Commission filed two actions, one against the South Carolina Tax Board of Review and Collins Music Company, Inc., and the other against the South Carolina Board of Review and Collins Novelty Company, Inc. Respondents moved that the cases be consolidated, as they had previously been jointly heard and the issues of fact and law were identical. The Commission had no objection to consolidation and this court granted Respondents' motion.

### SUMMARY OF FACTS

For the tax years 1982, 1983 and 1984, Collins Novelty Company, Inc. and Collins Music Company Inc. (collectively Collins) operated numerous coin operated amusement devices such as video game machines, pinball machines, pool tables and jukeboxes. In filing its property tax returns, Collins omitted from those returns video games, pinball machines, and jukeboxes which, although

included in its accounting records, were either permanently retired from service and placed in a warehouse or discarded. Collins did, however, include for property tax purposes all machines which it utilized in its business, whether on location or stored.

After an audit of Collins' records, the Commission included the items which were omitted from Collins' property tax returns and valued them at ten percent of their original cost pursuant to Regulation 117-110, Collins disagreed with the audit results and challenged the same in a hearing before the full Commission. Collins argued that: 1) Regulation 117-110 did not apply to the machines which had permanently been taken out of service or which were discarded, because such machines were not "merchant's equipment"; and 2) if the machines at issue were "merchant's equipment" the minimum property tax value of ten percent of original cost imposed by Regulation 117-110 was beyond the authority of applicable statutory language and the South Carolina Constitution and therefore the regulation was invalid.

The Commission issued its findings on June 2, 1988, concluding that the property at issue is merchants' equipment despite the fact that it may have been permanently taken out of service or discarded and that Regulation 117-110 is valid. Collins timely appealed the Commission's decisions to the Board. The Commission submitted to the Board (1) Collins' Appeal Notice, (2) the Commission's finding of fact and conclusions, (3) the Property Tax Division's exhibits 1 and 2, and (4) transcriptions of portions of testimony made during the hearing before the Commission. Copies of the record mailed to the Commission were provided to Collins. At the hearing, Collins requested that the Board consider certain additional information which it contended was part of the record before the Commission, but which had not been included in the material provided to the Board.

On August 3, 1989 the Board issued its order, which declined to consider the additional materials Collins had

requested it to review. In addition, the Board held that the equipment at issue was merchant's equipment and therefore subject to the provision of Regulation 117-110, but that Regulation 117-110 was invalid.

On August 17, 1989, the Commission filed a petition for judicial review of the Board's August 3 decision with respect to the validity of Regulation 117-110. Collins filed an answer and crossclaim on September 15, 1989, alleging that the Board's decision invalidating Regulation 117-110 was correct but that it erred in denying inclusion of the additional material submitted as part of the record and finding that the equipment at issue was merchant's equipment. The parties appeared before this court on February 14, 1990.

## ISSUES IN CONTROVERSY

1. Does this Court have jurisdiction over the two issues raised in Collins' closs-claim.
2. Should the Board have permitted Collins' submittal of additional material for inclusion in the record.
3. Was the equipment at issue merchant's equipment.
4. Was the Board's decision to invalidate Regulation 117-110 correct.

## HOLDINGS

### 1. JURISDICTION OVER ERRORS ALLEGED BY COLLINS

The Commission, in its oral argument and trial brief, contended that, even though Collins prevailed before the Board on one of its two alternative substantive arguments (prevailing on either one would have been satisfactory to Collins), Collins had to file a Petition with this court within thirty (30) days to protect its appeal rights in the alternative arguments which were decided against it. The Commission cited *Hamm v. Public Service Commission*, 287 S.C. 180, 336 S.E. 2d 470 (1985) and *Wingate*

*v. S.C. Department of Highways and Public Transportation*, 276 S.C. 39, 274 S.E. 2d 917 (1981) for this proposition. *Wingate* was a matter which was not controlled by the Administrative Procedures Act (APA) and is therefore of questionable relevance. *Hamm*, in addition to holding that a party had thirty days from notice of a decision to file an appeal, stated that "However clear the language of a statute may be, the court will reject that meaning when it leads to an absurd result not possibly intended by the legislature", citing *State, ex rel. McLeod v. Montgomery*, 244 S.C. 308, 136 S.E. 2d 778 (1964). The court feels that reading South Carolina Code Section 1-23-380 as the Commission suggests would lead to such an absurd result. Collins is not attempting to add legal arguments not presented to the Board. The Commission has had ample opportunity to prepare for such arguments and the Board properly addressed them. Sustaining the Commission's position would require unnecessary petitions be filed as a protective matter, with respect to issues which may already be resolved.

In addition, the Commission interpretation creates unnecessary tension between the APA and the South Carolina Rules of Civil Procedure (SCRCP) which permits an answer to an action within thirty days of service on the party. See, SCRCP Rule 12. Collins clearly met the SCRCP time limits. This court has jurisdiction over the issues presented in Collins' crossclaim.

2. INCOMPLETE RECORD.

Collins contends that the record submitted for the Board's review was incomplete and offered additional information which it contends was supplied to the Commission and should have been included in the record. The Commission contends that such information should not be included because it was not brought to the attention of counsel for the Commission until immediately before the commencement of the Board hearing. This court is in

agreement with the Board as to this matter and holds that because the taxpayer did not notify the Commission of any disputes with respect to the record prior to the hearing, it should be foreclosed from doing so at the hearing.

3. NOT MERCHANT'S EQUIPMENT

Collins next contends that the property in dispute should not be classified as merchant's property under South Carolina Code Section 12-37-930, and therefore should not be subject to the 10% floor provided in Regulation 117-110. Collins bases its argument on the fact that merchant, as commonly defined, contemplates engagement in business, and since the equipment at issue has been permanently removed from service and is not involved in business activity, it should not be classified as merchant's equipment. The Commission, on the other hand, states that merchant's equipment as contemplated by South Carolina Code Section 12-37-930 and Regulation 117-110 includes equipment which is not utilized in the business of a merchant so long as the equipment is owned by the merchant. The Commission further contends that had the legislature desired to exclude from the category of merchant's property, property that had been taken out of service, it would have specified the same in the language of the statute.

The ordinary meaning of merchant's equipment includes equipment owned by the merchant, whether or not such equipment continues to be used in the merchant's business. The Board correctly determined that the equipment at issue was merchant's equipment.

4. VALIDITY OF REGULATION

The Commission contends that the Board did not have the authority to declare Regulation 117-110 invalid. Its rationale for this position is that reasonable doubt as to the existence of a power should ordinarily be resolved against the same. *Mungo v. Smith*, 289 S.C. 560, 347 S.E.

2d 514 (1986). Chapter 5 of Title 12 South Carolina Code provides the enabling legislation for the Board. Section 12-5-50 provides that when the Commission makes an assessment and a taxpayer is aggrieved by the same, he shall have the right to appeal to the Board. Collins was aggrieved by the Commission's decision that Regulation 117-110 was valid and to tax the equipment permanently taken out of service and it appealed to the Board. Section 12-5-70 states that upon notice, exceptions, records and statement the Board shall make its findings and may affirm, modify or reverse the action of the Commission. The Board was merely acting under its statutory authority to reverse the Commission's decision that the controverted regulation was valid.

The Commission argues that as a member of the executive branch the Board cannot exercise judicial functions. However, the Commission ignores its own quasi-judicial nature as well as the Board's similar nature. When an agency acts as an arbiter of disputed matters, applies the facts and law to reach a decision, and the parties are bound to the record and findings, the agency is acting in a judicial capacity.

The Commission is contending that since the Board did not have the authority to invalidate the regulation the court is required to remand the issue to the Board to revise its decision. Procedurally Collins would then be required to file a new petition with this court or appeal the remand. It would be an unnecessary waste of Collins', the Commission's, and the court's resources to take such an approach. The validity of the regulation was brought to issue by the alternative arguments in the Commission's Petition and Collins' Answer, and is properly before this court.

S.C. Code Section 12-37-930 states:

> "All property shall be valued for taxation at its true value in money which in all cases shall be held to be the price which the property would bring following

> reasonable exposure to the market, where both the seller and the buyer are willing, are not acting under compulsion, and are reasonably well informed as to the uses and purposes for which it is adapted and for which it is capable of being used."

The statute goes on to apply special rules to valuation of certain acreage allotments, and manufacturer's machinery not applicable to this case. In addition, the South Carolina Constitution provides insight to the valuation issue in several provisions. Article 3, Code 29 provides, "All taxes upon property, real and personal, shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax." Article X, Section 3A requires that "All property subject to taxation shall be taxed in proportion to its value." Additionally, Article X, Section 1 states in part that, "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property." In spite of the statutory and constitutional language cited above, the Commission has issued Regulation 117-110 which states, in part, as follows:

Section 1.

> The fair market value of merchant's furniture, fixtures, and equipment shall be the depreciated value as shown by the merchant's records for income tax purposes, provided however, that in no event is the original cost of the property to be reduced by more than 90% of the original capitalized cost.

The regulation requires that valuation for property tax purposes must be made at a value equivalent to the depreciated value for income tax purposes, but such value cannot be less than 10% of the original cost of the merchant's property. On its face the regulation exceeds the authority provided by the applicable statutory and constitutional language.

In spite of the irregularity on its face, a regulation should be sustained so long as it is reasonably related to the purpose of the statute. *Hunter and Walden Co. v. South Carolina State Licensing Board for Contractors*, 272 S.C. 211, 251 S.E. 2d 186 (1978). In addition, Regulation 117-110 has been in effect since 1975, and the court has held that administrative interpretations of statutes which are consistently followed by agencies charged with their administration, and not expressly changed by the legislature, are entitled to great weight. *Marchant v. Hamilton*, 279 S.C. 497, 309 S.E. 2d 781 (S.C. App. 1983). However, this court finds no cases where the scope of this Regulation has been challenged by a taxpayer.

Although a regulation has the force of law, it cannot exceed the authority set forth in the statute. *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 325 S.E. 2d 313 (1984); See also, South Carolina Code Section 1-23-160. Also, a regulation must not materially alter or add to the law. *Milliken and Co. v. South Carolina Department of Labor Division of Occupational Safety and Health Administration*, 275 S.C. 269, 269 S.E. 2d 765 (1980). In *Stone Manufacturing Company v. South Carolina Employment Security Commission*, 219 S.C. 239, 64 S.E. 2d 644 (1951), the court held that administrative interpretation, though given great weight, was never conclusive on the courts. Additionally, the general rules favoring validity of regulations are more restricted in the context of revenue laws because the courts have consistently held that such laws are construed in favor of the taxpayer. *Clark v. South Carolina Tax Commission*, 259 S.C. 161, 191 S.E. 2d 23 (1972).

As a result of the above cited authority, this court sustains the Board's decision that Regulation 117-110 is invalid and this matter is remanded to the Commission for a determination of value. It is so ordered.

## APPENDIX C

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA TAX BOARD OF REVIEW

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A REVIEW OF THE ORDER OF THE SOUTH CAROLINA TAX COMMISSION, COLLINS MUSIC CO., INC. AND COLLINS NOVELTY CO., INC.

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### ORDER OF TAX BOARD OF REVIEW

[Entered August 3, 1989]

*Background*

This matter comes before us on the record from a Hearing before the South Carolina Tax Commission (the "Commission") held October 13 and October 14, 1987. The facts in the record reflect that the taxpayer maintains possession and stores much of its equipment previously used in the taxpayer's coin operated business—even though the equipment may have little, if any, value. The crux of this dispute is the assessment the Commission has made upon property which has been fully depreciated for income tax purposes and retired, but still held in storage by the Taxpayer. Pursuant to South Carolina Tax Commission Regulation 117-110, the Commission attributes a value to the property of not less than ten (10%) per cent of its original cost. The taxpayer, on the other hand, contends that the value of the property (merchant's equipment) should be its actual fair market value which it maintains is zero.

*Issues in Dispute*

1. *Incomplete Record.*

Taxpayer contends that the record submitted to us for review is incomplete and offers additional information which he contends was supplied to the Commission and should have been included in the record. The Commis-

sion contends that such information should not be included because it was not timely brought to the attention of counsel for the Commission until immediately before the commencement of the Hearing before this Board. We are in agreement with the counsel for the Commission as to this matter and hold that because the taxpayer did not previously notify the Commission of any disputes with respect to the record, it should be foreclosed from doing so now.

2. *Not Merchant's Equipment.*

Taxpayer next contends that the property in dispute should not be classified as merchant's property under S.C. Code Section 12-37-930, and therefore should not be subject to the 10% floor provided in Tax Regulation 117-110. Taxpayer bases his argument on the fact that merchant, as commonly defined, contemplates engagement in business, and since the equipment at issue is not involved in the taxpayer's business, it should therefore not be categorized as merchant's equipment. The Commission, on the other hand, states that merchant's equipment as contemplated by S.C. Code Section 12-37-930 and Tax Regulation 117-110 includes equipment which is not utilized in the business of a merchant so long as the equipment is owned by the merchant. The Commission further contends that had the legislature desired to exclude from the category of merchant's property, property that had been taken out of service, it would have specified the same in the language of the statute. We agree with the Commisison. The ordinary meaning of merchant's equipment includes equipment owned by a merchant whether or no such equipment continues to be used in the merchant's business.

3. *Validity of Regulation.*

Taxpayer's third argument involves a reading of Tax Regulation 117-110.

S.C. Code Section 12-37-930 states:

> "All property shall be valued for taxation at its true value in money which in all cases shall be held to be the price which the property would bring following reasonable exposure to the market, where both the seller and the buyer are willing, are not acting under compulsion, and are reasonably well informed as to the uses and purposes for which it is adapted and for which it is capable of being used." (Emphasis added.)

The statute goes on to apply special rules to valuation of certain acreage allotments, and manufacturer's machinery, however, the heart of the statute mandates that property is to be valued at its fair market value. The Tax Commission, however, has issued Tax Regulation (117-110 which states, in part, as follows:

"Section 1.

> The fair market value of merchant's furniture, fixtures, and equipment shall be the depreciated value as shown by the merchant's records for income tax purposes, provided however, that in no event is the original cost of the property to be reduced by more than 90% of the original capitalized cost." (Emphasis added.)

In summary, the regulation requires that valuation for property tax purposes must be made at a value equivalent to the depreciated value for income tax purposes, but such value cannot be less than 10% of the original cost of the merchant's property. The regulation on its face exceeds the scope of authority specifically provided by the statute. We are now faced with whether such regulation should be sustained.

A regulation should be sustained so long as it is reasonably related to the purposes of the statute. *Hunter and Walden Co. v. South Carolina State Licensing Board for Contractors*, 272 S.C. 211, 251 S.E. 2d 186 (1978).

In addition, Tax Regulation 117-110 has been in effect since 1975, and the court has held that administrative interpretations of statutes which are consistently followed by agencies charged with their administration, and not expressly changed by the legislature, are entitled to great weight. *Marchant v. Hamilton*, 279 S.C. 497, 309 S.E. 2d 781 (S.C. App. 1983). However, we find no cases where the scope of this Regulation has been challenged by a taxpayer.

Although a regulation has the force of law, it cannot exceed the authority set forth in the statute. *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E. 2d 313 (1984); See also, Code (1-23-160. However, a regulation must not materially alter or add to the law. *Milliken and Co. v. South Carolina Department of Labor Division of Occupational Safety and Health Administration*, 275 S.C. 269, 269 S.E. 2d 765 (1980). In *Stone Manufacturing Co. v. South Carolina Employment Security Commission*, 219 S.C. 239, 64 S.E. 2d 644 (1951), the court held that administrative interpretation, though given great weight, was *never* conclusive on the courts. Additionally, the general rules favoring validity of regulations are more restricted in the context of revenue laws because the courts have consistently held that such laws are construed in favor of the taxpayer. *Clark v. South Carolina Tax Commission*, 259 S.C. 161, 191 S.E. 2d 23 (1972).

As to this issue, we agree with the taxpayer. We hold that Tax Regulation 117-110 improperly extends the statutory mandate for property tax valuation with respect to the merchant's equipment at issue and is therefore invalid. We remand this issue to the South Carolina Tax Commission for a determination of fair market value of the property and the merchant's equipment's taxation on the basis thereof.

The Tax Commission's Finding is thus REVERSED AND REMANDED.

## APPENDIX D

## STATE OF SOUTH CAROLINA BEFORE THE SOUTH CAROLINA TAX COMMISSION

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IN RE: A FINDING CONCERNING THE VALUATION OF PROPERTY OWNED BY COLLINS MUSIC COMPANY, INC. FOR THE 1982, 1983 AND 1984 TAX YEARS.

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### FINDINGS OF FACT

The taxpayer herein is a South Carolina corporation identified as Collins Music Company, Inc. Pursuant to the taxpayer's corporate purpose, it operates and enters into contracts to operate coin-operated devices for a profit.

According to Section 12-37-970, merchants such as the taxpayer, are required to file annual property tax returns accounting for all inventories, equipment, furniture and fixtures.[1] These returns are submitted to the Tax Commission whereupon the Commission determines the assessed value of such property for tax purposes.

When the Tax Commission receives the above-mentioned returns, it values the returned property in accordance with Tax Regulation 117-110. That regulation provides as follows:

> Section I. The fair market value of merchants' furniture, fixtures and equipment shall be the depreciated value as shown by the merchants' records for income tax purposes, provided however, that in no event is the original cost of the property to be reduced by more than ninety percent of the original capitalized cost. Section II. This Regulation shall be effective for the 1975 tax year.

In the instant situation, the Field Services Division audited the taxpayer for the 1982, 1983 and 1984 tax

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[1] Section 12-37-970 places similar requirements on manufacturers.

years. Among other things, the audit revealed that the taxpayer had failed to return all of its equipment to the Tax Commission for property tax purposes. More specifically, it was found that the taxpayer did not return the coin-operated devices it had taken out of service and placed in storage.

Based on its findings, the Division assessed the taxpayer for the non-returned property. Pursuant to Tax Regulation 117-110, this was done by reference to such property's depreciated value as shown on the taxpayer's records for income tax purposes.[2] As a result the overall value of the taxpayer's property was increased by the following amounts:

| | |
|---|---|
| December 31, 1982 | $ 509,056.00 |
| December 31, 1983 | 1,113,722.00 |
| December 31, 1984 | $1,561,063.00 |

The taxpayer has now appealed the Division's assessment to this Commission in accordance with Tax Regulation 117-111. In doing so, it raises three issues. It first argues that the Division erred in using Regulation 117-110 to value the subject property because such property was not actually used by the taxpayer in its business. Secondly, the taxpayer claims the Division erred in using Regulation 117-110 to value the subject property because the regulation results in a value that exceeds fair market value. Finally, the taxpayer contends the Division's assessment is improper because it includes the value of property no longer owned by the taxpayer.

After having heard from both the taxpayer and Division, we address each of the above raised issues.

## ISSUE I

The taxpayer's first argument assumes Regulation 117-110 applies only to property actually being used by mer-

[2] The value thus arrived at was ten percent (10%) of original cost.

chants. We disagree. Tax Regulation 117-110 does nothing more than reflect the Commission's attempt to carry out the valuation requirements of Section 12-37-970.[3] Although it is not necessary to quote Section 12-37-970 here, we note that a reading of such statute gives no indication that it is limited solely to inventory equipment, furniture and fixtures currently used by merchants. Moreover, any attempt to imply such by the taxpayer is improper as it is a cardinal rule that a tax statute cannot be extended beyond the clear import of the language used. *Meredith v. Elliott*, 247 S.C. 335, 147 S.E.2d 244 (1966).

When the General Assembly has chosen to tax property based on use it has stated as much. Section 12-43-220(a) is an example of this point. There the General Assembly set the assessment ratio for manufacturing and utility property at ten and one-half percent (10 1/2%) but specifically limited such to property used in the conduct of business. There is no similar language in Section 12-37-970. We thus conclude the General Assembly intended no limitation.

ISSUE II

Section 12-37-930 requires that all property be valued at fair market value for property tax purposes. The taxpayer argues that the Division's use of Regulation 117-110 to value the subject property violates this statute by producing a value that exceeds fair market value. In an effort to prove its point, the taxpayer presented two witnesses who stated the subject property's actual value was zero.

In addressing this argument, it is initially noted that an administrative body cannot ignore its own regulations. *Cross v. United States*, 512 F.2d 1212 (1975); 2 Am. Jur. 2d, *Administrative Law*, Section 291. Here, the regu-

[3] It stands to reason if Section 12-37-970 is applicable to the subject property, then so is Tax Regulation 117-110.

lation in question has been promulgated under the auspices of Section 12-3-130. Accordingly, it has the full force and effect of law and must be followed by us until declared unlawful by the courts.

Aside from stating our obligation to follow Regulation 117-110, it is our further opinion that such is sustainable as a lawful regulation. Generally, a regulation will be sustained so long as it is reasonably related to the purpose of the statute. *Hunter and Walden Co. v. South Carolina State Licensing Board for Contractors*, 272 S.C. 211, 251 S.E.2d 186 (1978). This is particularly true where a regulation is used to fill up details by prescribing rules and regulations for the complete operation and enforcement of laws within an agency's expressed general purpose. *Young v. Department of Highways and Public Transportation*, 287 S.C. 108, 336 S.E.2d 879 (1985). A review of the following points reveals that Regulation 117-110 meets these criteria.

Sections 12-3-140(17) and 12-3-970 require the Tax Commission to value respectively the property of manufacturers and merchants for property tax purposes. Section 12-37-930 states that this value is to be at fair market value. However, as noted by the courts this is not a simple task.

> ". . . the task of checking the returns of thousands of merchants and manufacturers and arriving at the true value of their property in accordance with the applicable constitutional and statutory provisions is admittedly a most tedious and difficult one. . . ." *Newberry Mills v. Dawkins*, 259 S.C. 7, 190 S.E.2d 503 (1972).

To ease the burden confronting the Commission, the General Assembly amended Section 12-37-930 to provide that the fair market value of manufacturing machinery and equipment shall be determined by reducing the original cost by a stated depreciation rate. The statute addi-

tionally provides that original cost shall mean gross capitalized cost as shown by the property owner's records for income tax purposes.

Unfortunately, no similar provision was enacted to address merchants' property. Tax Regulation 117-110 fills this void. In doing so, it reasonably relates to Section 12-37-930 by adopting the same procedure for valuing merchants' property as is set forth in Section 12-37-930 for valuing manufacturing property.[4]

Finally, we do not think Regulation 117-110 violates the fair market value standard of Section 12-37-930. As stated above, Regulation 117-110, like Section 12-37-930's use the original cost minus depreciation technique to value certain properties. Inasmuch as Section 12-37-930's use of such technique has been held to reflect fair market value, it stands to reason Regulation 117-110 does likewise.[5]

The instant situation is similar to the matter in *Belk Department Stores v. Taylor*, 259 S.C. 174, 191 S.E.2d 144 (1972). Although occurring prior to the promulgation of Regulation 117-110, the Tax Commission there used original cost minus depreciation to determine the value of Belk's inventory. Belk objected and presented evidence to establish a lower value. The court, however, was not persuaded. It ruled for the Commission, noting that the original cost of property is to be accorded substantial weight on the issue of fair market value.

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[4] The only difference between Regulation 117-110 and Section 12-37-930 is that merchants' property can be depreciated to ten percent (10%) of value while manufacturing machinery and equipment is limited to twenty percent (20%).

[5] See *South Carolina Tax Commission v. South Carolina Tax Board of Review*, 278 S.C. 556, 299 S.E.2d 489 (1983) and *Stone Container Corp. v. South Carolina Tax Commission*, Memorandum Opinion No. 88-MO-032, wherein Section 12-37-930's use of original cost is held to be proper.

We are of the same opinion as the *Belk* court. The taxpayer has not presented sufficient evidence to overcome the substantial weight afforded to the Division's valuation. Neither of the taxpayer's witnesses actually inspected the subject property. Rather they simply stated they had viewed a list of property that morning and in their opinion it had no value. No indepth market analysis was submitted by the taxpayer nor was it ever explained to our satisfaction why the taxpayer went to the expense of keeping such property if it had no value.

## ISSUE III

The taxpayer's last argument is that the Division's assessment includes the value of property no longer owned by it. In view of the evidence, this argument is not a basis for reducing the Division's assessment.

First, there has been no attempt by the taxpayer to identify the property to which it is referring. Before a reduction can be made, the property and its value must be specified.

Second, and more importantly, even if the taxpayer's argument is correct, such has been brought on by its own actions. Pursuant to Regulation 117-110, the Division merely looked to the taxpayer's records to ascertain value. If the taxpayer, through improper record keeping, included property that should not have been reported, it is incumbent upon the taxpayer itself to correct the problem, not the Division.

## CONCLUSION

Based on the foregoing, we conclude that the values as ascertained by the Division should be certified as the subject property's value for the tax years in question. Naturally, in the event the depreciated values as shown on the taxpayer's income tax records are amended, these certified values must also be amended in a like manner.

AND IT IS SO FOUND AND ORDERED.

SOUTH CAROLINA TAX COMMISSION

/s/ S. Hunter Howard, Jr.
S. HUNTER HOWARD, JR.,
Chairman

/s/ John M. Rucker
JOHN M. RUCKER
Commissioner

/s/ A. Crawford Clarkson, Jr.
A. CRAWFORD CLARKSON, JR.
Commissioner

Columbia, South Carolina

June 2, 1988

## APPENDIX E

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA TAX COMMISSION

---

IN RE: A FINDING CONCERNING THE VALUATION OF PROPERTY OWNED BY COLLINS NOVELTY COMPANY, INC. FOR THE 1982, 1983 AND 1984 TAX YEARS.

### FINDINGS OF FACT

The taxpayer herein is a South Carolina corporation identified as Collins Novelty Company, Inc. The taxpayer's corporate purpose is to own coin operated devices which it in turn leases to others for a profit.

According to Section 12-37-970, merchants such as the taxpayer are required to file annual property tax returns accounting for all inventories, equipment, furniture and fixtures.[1] These returns are submitted to the Tax commission whereupon the Commission determines the assessed value of such property for tax purposes.

When the Tax Commission receives the above-mentioned returns, it values the returned property in accordance with Tax Regulation 117-110. That regulation provides as follows:

> Section I. The fair market value of merchants' furniture, fixtures and equipment shall be the depreciated value as shown by the merchants' records for income tax purposes, provided however, that in no event is the original cost of the property to be reduced by more than ninety percent of the original capitalized cost.

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[1] Section 12-37-970 places similar requirements on manufacturers.

Section II. This Regulation shall be effective for the 1975 tax year.

In the instant situation, the Field Services Division audited the taxpayer for the 1982, 1983 and 1984 tax years. Among other things, the audit revealed that the taxpayer had failed to return all of its equipment to the Tax Commission for property tax purposes. More specifically, it was found that the taxpayer did not return the coin-operated devices it had taken out of service and placed in storage.

Based on its finding, the Division assessed the taxpayer for the non-returned property. Pursuant to Tax Regulation 117-110, this was done by reference to such property's depreciated value as shown on the taxpayer's records for income tax purposes.[2] As a result the overall value of the taxpayer's property was increased by the following amounts:

| | |
|---|---|
| August 31, 1982 | $34,349.00 |
| August 31, 1983 | 44,007.00 |
| August 31, 1984 | 44,163.00 |

The taxpayer has now appealed the Division's assessment to this Commission in accordance with Tax Regulation 117-111. In doing so, it raises three issues. It first argues that the Division erred in using Regulation 117-110 to value the subject property because such property was not actually used by the taxpayer in its business. Secondly, the taxpayer claims the Division erred in using Regulation 117-110 to value the subject property because the regulation results in a value that exceeds fair market value. Finally, the taxpayer contends the Division's assessment is improper because it includes the value of property no longer owned by the taxpayer.

After having heard from both the taxpayer and Division, we address each of the above raised issues.

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[2] The value thus arrived at was ten percent (10%) of original cost.

## ISSUE I

The taxpayer's first argument assumes Regulation 117-110 applies only to property actually being used by merchants. We disagree. Tax Regulation 117-110 does nothing more than reflect the Commission's attempt to carry out the valuation requirements of Section 12-37-970.[3] Although it is not necessary to quote Section 12-37-970 here, we note that a reading of such statute gives no indication that it is limited solely to inventory, equipment, furniture and fixtures currently used by merchants. Moreover, any attempt to imply such by the taxpayer is improper as it is a cardinal rule that a tax statute cannot be extended beyond the clear import of the language used. *Meredith v. Elliott*, 247 S.C. 335, 147 S.E.2d 244 (1966).

When the General Assembly has chosen to tax property based on use it has stated as much. Section 12-43-220(a) is an example of this point. There the General Assembly set the assessment ratio for manufacturing and utility property at ten and one-half percent (10 1/2%) but specifically limited such to property used in the conduct of business. There is no similar language in Section 12-37-970. We thus conclude the General Assembly intended no limitation.

## ISSUE II

Section 12-37-930 requires that all property be valued at fair market value for property tax purposes. The taxpayer argues that the Division's use of Regulation 117-110 to value the subject property violates this statute by producing a value that exceeds fair market value. In an effort to prove its point, the taxpayer presented two witnesses who stated the subject property's actual value was zero.

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[3] It stands to reason if Section 12-37-970 is applicable to the subject property, then so is Tax Regulation 117-110.

In addressing this argument, it is initially noted that an administrative body cannot ignore its own regulations. *Cross v. United States*, 512 F.2d 1212 (1975); 2 Am. Jur.2d, *Administrative Law*, Section 291. Here, the regulation in question has been promulgated under the auspices of Section 12-3-130. Accordingly, it has the full force and effect of law and must be followed by us until declared unlawful by the courts.

Aside from stating our obligation to follow Regulation 117-110, it is our further opinion that such is sustainable as a lawful regulation. Generally, a regulation will be sustained so long as it is reasonably related to the purpose of the statute. *Hunter and Walden Co. v. South Carolina State Licensing Board for Contractors*, 272 S.C. 211, 251 S.E.2d 186 (1978). This is particularly true where a regulation is used to fill up details by prescribing rules and regulations for the complete operation and enforcement of laws within an agency's expressed general purpose. *Young v. Department of Highways and Public Transportation*, 287 S.C. 108, 336 S.E.2d 879 (1985). A review of the following points reveals that Regulation 117-110 meets these criteria.

Sections 12-3-140(17) and 12-3-970 require the Tax Commission to value respectively the property of manufacturers and merchants for property tax purposes. Section 12-37-930 states that this value is to be at fair market value. However, as noted by the courts, this is not a simple task.

> ". . . the task of checking the returns of thousands of merchants and manufacturers and arriving at the true value of their property in accordance with the applicable constitutional and statutory provisions is admittedly a most tedious and difficult one. . . ." *Newberry Mills v. Dawkins*, 259 S.C. 7, 190 S.E.2d 503 (1972).

To ease the burden confronting the Commission, the General Assembly amended Section 12-37-930 to provide

that the fair market value of manufacturing machinery and equipment shall be determined by reducing the original cost by a stated depreciation rate. The statute additionally provides that original cost shall mean gross capitalized cost as shown by the property owner's records for income tax purposes.

Unfortunately, no similar provision was enacted to address merchants' property. Tax Regulation 117-110 fills this void. In doing so, it reasonably relates to Section 12-37-930 by adopting the same procedure for valuing merchants' property as is set forth in Section 12-37-930 for valuing manufacturing property.[4]

Finally, we do not think Regulation 117-110 violates the fair market value standard of Section 12-37-930. As stated above, Regulation 117-110, like Section 12-37-930, uses the original cost minus depreciation technique to value certain properties. Inasmuch as Section 12-37-930's use of such technique has been held to reflect fair market value, it stands to reason Regulation 117-110 does likewise.[5]

The instant situation is similar to the matter in *Belk Department Stores v. Taylor*, 259 S.C. 174, 191 S.E.2d 144 (1972). Although occurring prior to the promulgation of Regulation 117-110, the Tax Commission there used original cost minus depreciation to determine the value of Belk's inventory. Belk objected and presented evidence to establish a lower value. The court, however, was not persuaded. It ruled for the Commission, noting

---

[4] The only difference between Regulation 117-110 and Section 12-37-930 is that merchants' property can be depreciated to ten percent (10%) of value while manufacturing machinery and equipment is limited to twenty percent (20%).

[5] See *South Carolina Tax Commission v. South Carolina Tax Board of Review*, 278 S.C. 556, 299 S.E.2d 489 (1983) and *Stone Container Corp. v. South Carolina Tax Commission*, Memorandum Opinion No. 88-MO-032 wherein Section 12-37-930's use of original cost is held to be proper.

that the original cost of property is to be accorded substantial weight on the issue of fair market value.

We are of the same opinion as the *Belk* court. The taxpayer has not presented sufficient evidence to overcome the substantial weight afforded to the Division's valuation. Neither of the taxpayer's witnesses actually inspected the subject property. Rather they simply stated they had viewed a list of property that morning and in their opinion it had no value. No indepth market analysis was submitted by the taxpayer, nor was it ever explained to our satisfaction why the taxpayer went to the expense of keeping such property if it had no value.

## ISSUE III

The taxpayer's last argument is that the Division's assessment includes the value of property no longer owned by it. In view of the evidence, this argument is not a basis for reducing the Division's assessment.

First, there has been no attempt by the taxpayer to identify the property to which it is referring. Before a reduction can be made, the property and its value must be specified.

Second, and more importantly, even if the taxpayer's argument is correct, such has been brought on by its own actions. Pursuant to Regulation 117-110, the Division merely looked to the taxpayer's records to ascertain value. If the taxpayer, through improper record keeping, included property that should not have been reported, it is incumbent upon the taxpayer itself to correct the problem, not the Division.

## CONCLUSION

Based on the foregoing, we conclude that the values as ascertained by the Division should be certified as the subject property's value for the tax years in question. Naturally, in the event the depreciated values as shown

on the taxpayer's income tax records are amended, these certified values must also be amended in a like manner.

AND IT IS SO FOUND AND ORDERED.

SOUTH CAROLINA TAX COMMISSION

/s/ S. Hunter Howard
S. HUNTER HOWARD, JR.
Chairman

/s/ John M. Rucker
JOHN M. RUCKER
Commissioner

/s/ A. Crawford Clarkson
A. CRAWFORD CLARKSON, JR.
Commissioner

Columbia, South Carolina

June 2, 1988

## APPENDIX F

[SEAL]

THE SUPREME COURT OF SOUTH CAROLINA

Clyde N. Davis, Jr.
Clerk
Brenda F. Shealy
Deputy Clerk

P.O. Box 11330
Columbia, S.C. 29211
Phone No. 734-1080

August 15, 1991

Curtis W. Stodghill, Esquire
Robert A. Dobson, III, Esquire
P. O. Box 1923
Greenville, S. C. 29602

John W. Kittredge, Esquire
408 East North Street
Greenville, S. C. 29601

Re: South Carolina Tax Commission v. South Carolina Tax Board of Review, et al.

Gentlemen:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing denied.

/s/ GEORGE T. GREGORY, JR. C.J.

/s/ A. LEE CHANDLER A.J.

/s/ ERNEST A. FINNEY, JR. A.J.

/s/ JEAN H. TOAL A.J.

/s/ ALEXANDER M. SANDERS, JR. A.A.J.

August 15, 1991."

The remittitur in this matter is today being forwarded to the Clerk of Court for Richland County.

Sincerely yours,

/s/ Clyde N. Davis, Jr.
Clerk

CND,Jr./dmh

cc: Joe L. Allen, Jr., Esquire
Ray N. Stevens, Esquire

FILED
DEC 13 1991
OFFICE OF THE CLERK

(2)

No. 91-795

*IN THE*

# Supreme Court of the United States

OCTOBER TERM, 1991

COLLINS MUSIC COMPANY, and
COLLINS NOVELTY COMPANY, INC.,
Petitioners,

v.

SOUTH CAROLINA TAX COMMISSION
Respondent.

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOE L. ALLEN, JR.
RAY N. STEVENS*
PO Box 125
Columbia, SC 29214
(803) 737-4430
*Attorneys for Respondent*

*Counsel of Record

## QUESTIONS PRESENTED

1. Is the due process question presented by the taxpayer in its Petition properly reviewable by the United States Supreme Court where such due process issue was not raised in any administrative or judicial hearing below and was not ruled on by any administrative or judicial body?

2. Is the due process question presented by the taxpayer in its Petition properly reviewable by the United States Supreme Court where the sole issue decided by the South Carolina Supreme Court was decided on state law grounds, with such grounds being that 27 S.C. Code Ann. Regs. 117-110 (1976) did not exceed the limits on delegation of authority to the executive branch allowed under the South Carolina Constitution?

3. Where the evidence in the record supports a valuation method based on cost less depreciation with a minimum floor and where the value determined under Regulation 117-110 uses such a method, is a substantial federal question presented when the alleged violation is that the valuation is so irrational and arbitrary as to be in conflict with due process?

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II. The Petition Should Be Denied Since The Holding Of The South Carolina Supreme Court (i.e., The Authority Of The Tax Commission To Establish Value Under Regulation 117-110 Did Not Exceed The Limits Of Delegation Of Authority To The Executive Branch Allowed Under The South Carolina Constitution) Is A Holding Based Solely On State Grounds And Is Inappropriate For Review By This Court ..... 5

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## STATEMENT OF THE CASE

This matter involves valuing merchant's equipment for property tax purposes. For the tax years 1982, 1983, and 1984, Collins owned numerous coin-operated devices, such as video game machines, pool tables, and jukeboxes. In filing its property tax returns, Collins omitted from its returns any coin-operated device which, while even though still owned by Collins, was no longer in use. The items omitted had been placed in storage. After an audit of Collins' records, the omitted devices were included for property tax purposes and valued at 10% of their original cost as required by 27 S.C. Code Ann. Regs. 117-110 (1976).

Collins disagreed with the audit results and challenged these findings in a hearing before the South Carolina Tax Commission. Collins argued first that Regulation 117-110 applied only to merchants' equipment actually used in a business, and that Collins' equipment was placed in storage and thus was not being used. Since there was no actual use, Collins argued Regulation 117-110 did not apply to it. Second, Collins argued that even if Regulation 117-110 did apply, the use of a value of 10% of the original cost was employing a method not allowed by statute. Thus, Collins argued Regulation 117-110 was invalid.

The South Carolina Tax Commission issued its Findings of Fact and Conclusions on June 2, 1988, in which it held the items placed in storage, even if not in use, were still reportable for property taxation and that Regulation 117-110 set a proper valuation method. On June 15, 1988, Collins filed with the Tax Board of Review an appeal of the South Carolina Tax Commission decision. Pursuant to S.C. Code Ann. Section 12-5-60 (1976) (see Apppendix B), the South Carolina Tax Commission filed with the Board the record made before the South Carolina Tax Commission. In accordance with S.C. Code Ann. Section 12-5-70 (1976) (see Appendix B), the Board

undertook its review of the record which consisted of Collins' appeal notice to the Board, the South Carolina Tax Commission's Findings of Fact and Conclusions, the Property Division's Exhibits 1 and 2, and a Transcript of the Testimony made before the South Carolina Tax Commission.

On August 3, 1989, the Board issued its Order. The Board held Collins' equipment was properly merchants' equipment subject to property taxation even when such was placed in storage. Finally, the Board held Regulation 117-110 invalid and directed the matter be remanded for the South Carolina Tax Commission to determine the value of the equipment.

On August 17, 1989, the South Carolina Tax Commission filed its Petition under S.C. Code Ann. Section 1-23-380 (1986) of the South Carolina Administrative Procedures Act for judicial review of the Board's decision that Regulation 117-110 was invalid. On September 15, 1989, Collins filed an Answer and Crossclaim to the Petition in which it alleged the Board erred in finding that equipment that was not actually in use was taxable as merchants' equipment.

The matter was heard by the South Carolina Circuit Court as a Petition to review an administrative decision (Petition for Writ, Appendix B, p. 6a.) and as such, the Court made its review based on the record as made before the South Carolina Tax Commission. The Petition filed by the Tax Commission asked the Court to overturn the Board's holding that Regulation 117-110 was invalid. On March 23, 1990, Judge Howell disagreed with the Tax Commission's view and issued an Order upholding the Board's conclusion that Regulation 117-110 was invalid.

An appeal to the South Carolina Supreme Court was made by the Tax Commission on March 30, 1990. On appeal, the taxpayer argued that the regulation was outside the statutory and constitutional authority under South Carolina's statutory law and under the South Carolina Constitution. (Taxpayer's

Respondent's Brief to the South Carolina Supreme Court, p. 10.) The South Carolina Supreme Court examined the statutory authority of S.C. Code Ann. Section 12-37-930 (Supp. 1990) and the South Carolina constitutional requirements of S.C. Const. art. III, Section 29; art. X, Section 1; and art. X, Section 3A and reversed the Lower Court by concluding that "... the Tax Commission has not exceeded its authority by promulgating Regulation 117-110, as it is within statutory and constitutional bounds." (Petition for Writ, Appendix A, p. 5a.) The taxpayer has now filed a Writ of Certiorari seeking the reversal of the South Carolina Supreme Court.

## ARGUMENT I

## THE PETITION SHOULD BE DENIED SINCE THE DUE PROCESS ISSUE WHICH THE TAXPAYER NOW SEEKS TO ASSERT WAS NOT RAISED NOR RULED UPON AT ANY LEVEL OF SOUTH CAROLINA'S ADMINISTRATIVE OR JUDICIAL HEARING PROCESS.

It is a well-settled principle that the Supreme Court has no jurisdiction to examine a final judgment of a state court where the record demonstrates the federal claim now being asserted was not presented in the state system. *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897); *Webb v. Webb*, 451 U.S. 493, 496-497 (1981). Based on this principle, the Supreme Court should not grant review in the instant matter since the alleged federal claim, a supposed violation of due process, was never raised or ruled upon by any administrative or judicial forum in the state adjudication system. Such a conclusion is even more appropriate here where the entire South Carolina adjudication process was based upon the administrative record made before the South Carolina Tax Commission as required by Sections 12-5-60, 12-5-70, and 1-23-380(f). Nowhere in that administrative record or, for that matter, at any proceedings at any level of the state judicial system did the taxpayer assert application of Regulation 117-

110 created a violation of its rights to due process. A review of that record supports this position.

The issue the taxpayer seeks to assert is that application of Regulation 117-110 is a violation of due process as ". . . an irrational and arbitrary abuse of the Tax Commission's power . . ." (Petitioner's Writ at p. (i).) The record shows that no challenge under the due process clause was ever raised.

Rather than due process being an issue, the record is repleat with instances revealing that the only issue relating to Regulation 117-110 was the state law issue of whether the regulation exceeded the authority granted to the Tax Commission under South Carolina statutes and the South Carolina Constitution. In the transcript of the testimony before the Tax Commission, the taxpayer never asserts that Regulation 117-110 is so arbitrary and irrational as to be a violation of due process. Rather, the taxpayer's testimony states the issue is whether the ". . . regulation is in contravention of specific statutory language or the constitutional language found in Article 3 Section 29 [of the SC Constitution.]" (See Tr. of Record, pp. 78-79.) The decision of the Tax Commission did not find due process to be an issue. Rather, the Commission found that "[t]he taxpayer argues that the Division's use of Regulation 117-110 to value the subject property violates [Section 12-37-930] by producing a value that exceeds fair market value." (See Petitioner's Writ, p. 20a.) When the taxpayer appealed the Tax Commission's decision to the Tax Board of Review, the taxpayer's appeal notice made no mention of due process. The position on appeal to the Board, as stated by the taxpayer, was simply the state law issue that the ". . . regulation is invalid as violative of section 12-37-930 and the South Carolina Constitution,. . ." (See Tr. of Record, p. 23.)

Neither the Tax Board of Review, the Circuit Court, nor the South Carolina Supreme Court had a due process argument

presented or addressed. The Board, while it agreed with the taxpayer, did not do so on any grounds based on due process. Again the issue was one in which the Board held "[t]he regulation on its face exceeds the scope of authority specifically provided by the statute." (See Petition for Writ, p. 16a.) On appeal to the Circuit Court, the Court only addressed whether the regulation was valid within the authority given to the Tax Commission as limited by Section 12-37-930; art. III, Section 29; and art. X, Section 3A. The South Carolina Supreme Court, in upholding the validity of the regulation, did so by addressing the sole issue of whether the regulation was constitutional under the South Carolina Constitution.

Based on the record created in the administrative hearing before the Tax Commission and all subsequent hearings before the Board, the Circuit Court, and the South Carolina Supreme Court, no due process challenge was ever made. It is now improper for the taxpayer to attempt to raise an issue to this Court that was not addressed in the state system. Accordingly, this Court should deny the taxpayer's Petition.

## ARGUMENT II

THE PETITION SHOULD BE DENIED SINCE THE HOLDING OF THE SOUTH CAROLINA SUPREME COURT (i.e., THE AUTHORITY OF THE TAX COMMISSION TO ESTABLISH VALUE UNDER REGULATION 117-110 DID NOT EXCEED THE LIMITS OF DELEGATION OF AUTHORITY TO THE EXECUTIVE BRANCH ALLOWED UNDER THE SOUTH CAROLINA CONSTITUTION) IS A HOLDING BASED SOLELY ON STATE GROUNDS AND IS INAPPROPRIATE FOR REVIEW BY THIS COURT.

Argument I explains that the taxpayer did not raise a due process question at any level of the state system and thus no federal question having been raised in the state court, this Court should not grant the Petition. Argument II identifies the

issue addressed as being a pure state law issue and therefore presents a second valid reason for this Court's denial of the Petition.

It is well established that the Supreme Court will not review a decision of the state court where the state court decision rests upon an adequate and independent state ground. *Bell v. Maryland,* 378 U.S. 226 (1964); *Michigan v. Long,* 463 U.S. 1032 (1983). The taxpayer, in its Petition, states very clearly that in the state court ". . . the issue in controversy was that Regulation 117-110 exceeds the limits of the statutory foundation provided in section 12-37-930." (Petition for Writ, p. 12). This is a pure state law question dealing with the delegation of legislative power and one which is bottomed on an interpretation of art. III, Section 1, and art. I, Section 8 of the South Carolina Constitution.

Article III, Section 1, states in relevant part the following:

> The legislative power of this State shall be vested in . . . the General Assembly of the State of South Carolina.

In the same vein, art. I, Section 8, declares a separation of powers between the branches of state government:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of another.

The ability of an administrative agency to promulgate and to carry out regulations is always tempered by these two provisions of the South Carolina Constitution since "[i]t is well settled that . . . the Legislature may not delegate its power to make laws,. . ." *Heyward v. South Carolina Tax Commission,*

240 S.C. 347, 126 S.E.2d 15, 19 (1962). The issue which the state court must decide under these provisions of the state constitution is one of determining "[t]he degree of authority that may lawfully be delegated to an administrative agency . . ." *Terry v. Pratt*, 258 S.C. 177, 187 S.E.2d 884, 886 (1972). In some instances, the South Carolina Supreme Court has determined the lawful degree of delegated authority to an administrative agency has been exceeded. See *Heyward*, supra, and *Hay v. South Carolina Tax Commission*, 273 S.C. 269, 255 S.E.2d 837 (1979). On other occasions, the delegation of authority has been found proper. See *State ex rel Roddey v. Burns*, 219 S.C. 485, 66 S.E.2d 33 (1951); *Clarke v. South Carolina Public Service Authority*, 177 S.C. 427, 181 S.E. 481 (1935); *Terry v. Pratt*, supra.

In each of these cases, the issue was analyzed solely on state law grounds. The instant action is no different. The taxpayer at every level of South Carolina's adjudication process addressed the question as a state law issue. In the administrative hearing before the Tax Commission, the taxpayer's own testimony states the issue is whether the ". . . regulation is in contravention of specific statutory language or the constitutional language found in Article 3 Section 29 [of the SC Constitution.]" (See Tr. of Record, pp. 78-79.) The taxpayer's own statements in its appeal to the Tax Board of Review argues the state law issue that the ". . . regulation is invalid as violative of section 12-37-930 and the South Carolina Constitution,. . ." (See Tr. of Record, p. 23.) The Board addressed the state law issue of whether "[t]he regulation on its face exceeds the scope of authority specifically provided by the statute." (See Petition for Writ, p. 16a.) The Circuit Court addressed the state law issue of whether the regulation was valid and held ". . . Regulation 117-110 is invalid . . ." (See Petition for Writ, p. 13a.) The South Carolina Supreme Court concluded ". . . the Tax Commission has not exceeded its authority by promulgating Regulation 117-110,. . ." (Petitioner's Writ, p. 5a.)

The ability to delegate legislative authority to administrative agencies is a state law issue involving South Carolina's interpretation of its own Constitution. This issue has been resolved in the instant case on state law grounds and such ground is not a reviewable issue by this Court. Accordingly, the taxpayer's Petition should be denied.

## ARGUMENT III

THE PETITION SHOULD BE DENIED SINCE ITS ALLEGATION (i.e., THE VALUATION OF THE TAXPAYER'S PROPERTY IS IRRATIONAL AND ARBITRARY) DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION WHERE, AS IN THE INSTANT CASE, THE EVIDENCE SUPPORTS THE METHOD OF VALUATION DETERMINED UNDER REGULATION 117-110.

The due process clause seeks only to prohibit purely arbitrary acts affecting property. *Southwestern Oil v. Texas*, 217 U.S. 114, 119 (1910). In fact, so long as the tax on property is not palpably arbitrary, the tax will be upheld. *Lawrence v. State Tax Commission of State of Mississippi*, 286 U.S. 276 (1932). Here, the tax is not arbitrary and the method of valuation employed by Regulation 117-110 is supported by the record as an acceptable method of valuation.

Section 12-37-930 employs a method of valuation based on what a willing buyer would pay a willing seller for the property under review. In complying with the standard of this section, Regulation 117-110 uses the original cost of the property less depreciation as shown for income tax purposes but no reduction for depreciation of more than 90%. Thus, there is a salvage value of 10% of the cost established. This method is a valid approach to valuation.

The use of cost is an appropriate means to value property under the willing buyer and willing seller standard since "...

the cost of an article is ordinarily some evidence of its value for tax purposes." *Belk Department Stores v. Taylor*, 259 S.C. 174, 191 S.E.2d 144, 146 (1972). Further, the use of a salvage value after depreciation is also reasonable since it must be assumed that as long as the owner decides to keep the property, it must have some minimum salvage value. As this Court has stated in a slightly different context, "... it is sound accounting practice annually to accrue ... an amount which at the time it is retired will with its salvage value replace the original investment therein." *Detroit Edison Co. v. Commissioner*, 319 U.S. 98, 101 (1943). Further, this Court has upheld the use of a salvage value to limit income tax deductions under earlier provisions of the Internal Revenue Code when the Court stated "... Congress intended that the taxpayer should, under the allowance for depreciation, recover only the cost of the asset less the estimated salvage, resale or second-hand value." *Massey Motors, Inc. v. United States*, 364 U.S. 92, 107 (1960). The Court reached this conclusion even thought it recognized the great "risk of error" in projecting the salvage value.

In a similar way, in the instant matter, the regulation merely attempts to account for the salvage value of a "vast array of items including such diverse items as typewriters, file cabinets, racks, desks, adding machines, storage shelves, and any other personal property that a merchant might have in a business." (Tax Commission's Appellant's Br., ftn 8, pp. 16 & 17.) Under such circumstances, the use of a salvage value cannot be said to be arbitrary.

Finally, the 10% salvage is not arbitrary since the record shows that as to the taxpayer's property, such is a reasonable valuation. The taxpayer's witness at the hearing before the Tax Commission was asked if the value of the taxpayer's property would be less than 10% of the cost. The witness responded that a 5% to 7% value "would probably be an average." (Tr. of Record before the South Carolina Supreme Court, p. 60.) The margin of error between 7% and 10% is not

so great as to be in violation of due process. Minor discrepancies or the fact that a more accurate system could be established is not a violation of due process. *Salomon v. State Tax Commission of New York*, 278 U.S. 484 (1929).

## CONCLUSION

The taxpayer's Petition should be denied. The due process issue that the taxpayer now seeks to raise was never raised at any level in the state adjudication process, and accordingly, the federal question was never addressed in the state court. Likewise, there is no federal question for review since the only issue now in dispute is a pure state law issue of whether the Tax Commission exceeded its authority to promulgate regulations when it established Regulation 117-110. The scope of authority of an administrative agency to issue regulations is a question answered by interpreting the South Carolina Constitution as it relates to the separation of powers of the branches of government and the legislative powers of the General Assembly. Finally, even if the due process challenge is properly raised, such issue does not present a substantial federal question. The use of a cost method with a requirement for a salvage value is not arbitrary. Rather, such an approach is entirely reasonable when dealing with the large mass of merchants' property required to be valued.

Respectfully submitted,

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# APPENDICES

# APPENDIX A

## Section 1-23-380 (a) and (f)

(a) A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article and Article 1. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

## APPENDIX B

### Section 12-5-60

Within ten days after receipt by mail or otherwise of such notice of increase by the Commission, such person or representative of the county, municipality or tax district shall serve by mail or otherwise upon the chairman of the Commission a written notice of his intention to appeal to the board, together with the specific grounds upon which a reversal or modification of the action of the Commission is desired, and, upon such notice and grounds being served, the Commission shall transmit to the Board all papers, books and documents relating to the matters to be reviewed together with any statement the Commission may desire to make.

### Section 12-5-70

Upon such notice, exceptions, records and statement the Board shall make its findings and may affirm, modify or reverse the action of the Commission. The appellant and the Commission shall be entitled to a hearing before the board in person or by such attorneys as the appellant and the Commission may employ.

# APPENDIX C

## Article III, Section 1

The legislative power of this State shall be vested in two distinct branches, the one to be styled the "Senate" and the other the "House of Representatives", and both together the "General Assembly of the State of South Carolina."